89-1924

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VITO SPILLONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Fifth Amendment allow government counsel to knowingly conceal from the grand jury that one of its primary witnesses is wholly unreliable and untrustworthy?

2. Does the Fifth Amendment permit government counsel to allow witnesses to perjure themselves before the grand jury?

3. Does the Fifth Amendment allow a Special Agent of the Federal Bureau of Investigation and government counsel to vouch for the testimony of witnesses before the grand jury when they know such testimony is perjurious?

4. Are Title III orders subject to the Fourth Amendment prohibition against general warrants?

5. Can a Title III order, supported by a proper Application and statement of suspected criminal liability related to extortionate acts, survive the Fourth Amendments prohibition against general warrants when the executory portion of said order authorizes interception of conversations concerning almost every major federal crime, the vast majority of which have no relationship to the factual averments in the application?

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No. ———

VITO SPILLONE,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Vito Domonic Spillone respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on June 15, 1989.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit reported at 879 F.2d 514 (9th Cir. 1989) is reproduced and attached in full as Appendix A.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed June 15, 1989. A petition for rehearing and suggestion for rehearing in banc was

timely filed and denied on February 12, 1990. A copy of this order is reproduced in full and is attached as Appendix B. Justice O'Connor granted petitioners an extension of time in which to file for Certiorari until June 12, 1990. A copy of this Order is reproduced in full and attached as Appendix C. This Court's jurisdiction is properly invoked pursuant to 28 U.S.C. Section 1254(1) and Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable constitutional provisions are the Fourth Amendment and the Fifth Amendment to the United States Constitution. Those Constitutional Amendments are reproduced in full and attached as Appendix D.

STATEMENT OF THE CASE

On July 12, 1984, a federal grand jury in the Central District of California indicted petitioner Vito Spillone and five other men for violations of the law relating to extortionate credit activities. Mr. Spillone was charged with RICO conspiracy (18 U.S.C. Section 1962(d)), racketeering (18 U.S.C. Section 1962(c)) and making extortionate extensions of credit (18 U.S.C. § 892, 894). On November 15, 1984, the same grand jury returned an almost identical indictment against the same defendants, with only a change of certain dates from the original indictment.

Government counsel presented one of its major witnesses to the grand jury as a credible person knowing full well that he had a substantial criminal record involving fraud and dishonesty and had been discontinued as an informant by the F.B.I. and D.E.A. because of his untrustworthiness and unreliability. Two government witnesses and an F.B.I. agent perjured themselves before the grand jury as to material matters. This testimony was condoned by government prosecutors who then knew of its perjurious nature.

The government's primary witness before the grand jury was one Johnny Angelo who did not testify at the trial of this case. Mr. Angelo had been a D.E.A. and F.B.I. informant since 1976 and received some $80,000 as payment therefore. In 1981, Mr. Angelo was the primary informant in an affidavit of F.B.I. case agent William Weichert, regarding this case, in support of the applications for electronic surveillance. Prior to his grand jury testimony, Mr. Angelo had been convicted of nine felonies, all of which involved moral turpitude, four while he was a government informant and the last two in 1982, shortly before his initial grand jury testimony.

In April of 1982, before his first grand jury appearance, Mr. Angelo was deactivated as a D.E.A. and F.B.I. informant because he was deemed untrustworthy. In September of 1983, Mr. Angelo was given an illegal one year reduction of sentence and released from state custody just prior to his second grand jury appearance at the specific request of F.B.I. Special Agent William Weichert and Strike Force Chief James Henderson (which Messrs. Henderson and Weichert concealed from the court, grand jury and defense counsel).

Mr. Angelo testified twice before the grand jury, which was never told of his criminal record or that he was deemed untrustworthy and unreliable by both the D.E.A. and F.B.I. Angelo told the grand jury that he became an informant against petitioner after hearing of a death threat against him by petitioner in 1982 (six years after becoming an F.B.I. informant and one year after being an informant against petitioner in a 1981 wiretap application). Mr. Angelo also told the grand jury that his sole motivation for being an informant was the death threat and that he was getting no benefit from the government for his testimony. This perjury not only went uncorrected but was repeated to the grand jury by the summarizing F.B.I. agent and condoned by a government prosecutor.

The majority, in its June 15, 1989, opinion, at p. 6333, ruled that "a prosecutor has no duty to present evidence bearing on witness credibility to the grand jury. See, e.g., *United States v. Busher* 817 F.2d 1409, 1411 (9th Cir. 1987)." *Busher, supra,* holds that "the prosecutor has no duty to present exculpatory evidence to the grand jury", relying, for that proposition, on *United States v. Al Muddaris,* 695 F.2d 1182, 1185 (9th Cir. 1983), which held that, "The prosecutor has no duty to present to the grand jury *all* matters bearing on the credibility of witnesses or any exculpatory evidence (authority cited)." (Emphasis supplied). The court in *Al Muddaris, supra,* then used *United States v. Samango,* 607 F.2d 877, 883 (9th Cir. 1979), as an illustration of where the line should be drawn "at the prosecutor's failure to alert the grand jury to latent credibility problems of a suggestible, drug addicted and possibly biased informant's transcribed key testimony. 607 F.2d at 883." The credibility problems of the witnesses in this case make those in *Samango* seem pale by comparison.

The majority opinion, at p. 6334, states, in essence, that Mr. Angelo's perjury was not material to the defendant's indictment and only affected his credibility. His perjury was limited, in the court's opinion, to Angelo's assertions that he did not become a government informant until after his dealings with Spillone. Nor, in the court's opinion, did Agent Weichert's confirmation of this erroneous testimony warrant dismissal of the indictment, because not all erroneous statements of government agents warrant dismissal of the indictment.

Johnny Angelo was the centerpiece of the government's grand jury presentation,[1] as its most devastating and prejudicial witness against petitioner. Mr. Angelo told

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[1] In addition to being the most significant contributor to the government's wiretap application, Mr. Angelo testified on two occasions before the grand jury in this case. His testimony may be found at E.R. 1144-1199.

the grand jury that Vito Spillone was forming a Mafia family to extort money from bookmakers and engage in loan sharking. Spillone was very high in the Mafia (E.R. 1148) and was the "boss of bosses" in Los Angeles, answerable only to the head of the Chicago Mafia (E.R. 1150). No other witness gave such prejudicial testimony.

Mr. Angelo, who was presented to the grand jury by the government as a credible witness, testified that:

1. He was a crime partner of Spillone's until late 1982 when he learned of a death threat on his life and only then became a government informant against Spillone; and

2. He was getting no benefit from his cooperation with the government.

At the time of Mr. Angelo's first appearance before the grand jury in December of 1982, he had been convicted of nine (9) separate felonies and terminated as an F.B.I. and D.E.A. informant because he was, among other things, deemed untrustworthy. For the government prosecutor to have presented Angelo to the grand jury as a credible witness constituted a fraud upon and undermined the fundamental fairness of the grand jury. This is not a situation, as suggested in the majority opinion, where there is something that could affect a witness' credibility that is not brought to the grand jury's attention. Here, the government is presenting its most important witness to the grand jury, knowing he is totally unreliable.

Angelo testified before two separate grand juries, that he became an informant after learning of an alleged death threat on his life[2] and that he was getting no consideration for his cooperation with the government. This

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[2] Angelo learned of this death threat in November of 1982, one month before his first grand jury testimony.

was blatant perjury.[3] The government lawyers who conducted those two grand juries knew Angelo's testimony was perjurious when given and did nothing to correct it. Even worse, before the first indicting grand jury, a government prosecutor and an F.B.I. agent, under oath, knowingly repeated and endorsed said perjury.

That the above described situation was not an isolated incident in this prosecution is demonstrated by a similar occurrence with another material witness in this case named Irving Minster. Mr. Minster testified before the grand jury and at trial that the defendants (including petitioner) took over all loansharking operations at a local card parlor known as the Bell Club. After the defendants appeared and during the course of the charged indictment, it was Minster's grand jury and trial testimony that he never loaned money to anyone and *all* requests for loans were referred to the defendants.

The majority, in its June 15, 1986, opinion, found that Irving "Minster had perjured himself before the grand jury by denying that he was a loan shark at the Bell Club *before* the defendants took over all loan sharking activity." (P. 6635.) (Emphasis supplied.) This finding misses the thrust of petitioner's argument. Minster was loan sharking at the Bell Club *during the time* in which the government alleged, in the indictment and through trial, the defendants had taken exclusive control of loan sharking at the Bell Club.

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[3] Angelo had been a D.E.A. and F.B.I. informant since 1976, had received $80,000.00 before he was discontinued, and was the main informant for the wiretap applications one year before his grand jury testimony. Mr. Angelo also received sentencing benefits, got to serve time in federal as opposed to state prisons, and received an illegal one-year sentence reduction less than one month before his September 1982 grand jury testimony because of the intervention of Mr. Henderson, who conducted that grand jury and let Angelo perjure himself therein. Mr .Henderson also attempted to conceal his involvement on Angelo's behalf.

F.B.I. Special Agent William Weichert knew of Minster's loan sharking activities during this period, because he conducted an investigation during which Minster was observed and electronically overheard engaging in more than one loan sharking activity. Weichert, in fact, dictated the search warrant affidavit which supported a search of Minster for these very activities. (R.T. 3317, 3351 and 3373)

In its June 15, 1989, opinion the majority relied upon Weichert's testimony that he forgot about the search warrant, and upon a finding by the district court that the prosecutors were not aware of Minster's perjury (P. 6335). An examination of the record, reveals such reliance was misplaced.

Weichert also validated Minster's perjury before the grand jury when he testified, as a summary witness, that Minster abided by the rules of the Spillone organization and turned *all* loan sharking activities over to them during the very period in which he personally had observed Minsted loan sharking over a substantial length of time. This testimony, unfortunately, was no less perjurious than Minster's. (1/12/84 G.J. pp. 10-17)

There is also substantial evidence that the prosecutor who conducted the grand jury before which Mr. Minster perjuriously denied he was a loan shark knew of Minster's loan sharking activities before that grand jury appearance.

Strike force attorney James Waltz testified, in a motion hearing during the trial of this case, that he met with Minster and Weichert just prior to Minster's grand jury testimony and told Minster that he had been observed engaging in loan sharking transactions. After this metting, Minster testified before a grand jury conducted by Waltz, that he was not a loan shark. Waltz, the prosecutor, therefore knew Minster was perjuring himself. (R.T. 3212-3240)

Six months later, before the indicting grand jury which Mr. Waltz (the prosecutor) conducted, Minster's perjury was repeated by Weichert and condoned by the prosecutor. (1/12/84 G.J. 57)

In great part the evidence against petitioner was obtained as the result of three 30 day court authorized electronic interceptions of conversation in his office and over his business telephones. These same interceptions were also used by the government to obtain the testimony of the three main prosecution witnesses who testified against petitioner at the trial of this case. Motions to suppress the wiretap orders were made in the district court on the ground that the executory language of each order constituted a general warrant in violation of the Fourth Amendment and *Berger v. New York*, 388 U.S. 41, 44 (1967). Said motions were denied in the district court whose ruling was affirmed by the United States Court of Appeals for the Ninth Circuit, Opinion Appendix A, pp. 6320-6321. The executory portion of each of the said three orders commences with:

"WHEREFORE, it is hereby ordered that * * *" and proceeds with an attempt to comply with each of the directives of 18 U.S.C. Section 2518 (4) (a through e). The only description of the criminal activities which may be intercepted and a statement of the specific statutory offense to which it relates as required by 18 U.S.C. Section 251 (4) (c) is the same in each case as follows:

> "The interceptions sought herein for a period of 30 days are to be conducted under Sections 2518, Title 18, United States Code, *concerning the offenses enumerated in Section 251C of Title 18, United States Code.*" (Emphasis added.)

As stated in the attached opinion (Appendix A at 6320) "Section 2516 lists virtually every serious crime in the United States Code." On its face the order directs that the monitoring agent listen to conversations concerning every serious crime in the United States and is not

limited to those crimes described in the application and other portions of the order.

It is true, as stated by the Court of Appeals, that a reading of the three wiretap applications (which are quite voluminous) and careful consideration of the three court authorizations reveals the focus is on crimes relating to extortionate credit. However, it is equally clear that the only directive referring to the nature of the conversations which may be intercepted is entirely contained in the above quoted statement referring to offenses contained in Section 2516 (virtually every serious federal crime).

REASONS FOR GRANTING CERTIORARI

I. THE PUBLISHED DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN CONDONING THE PROSECUTOR'S KNOWING USE OF UNRELIABLE AND PERJURED TESTIMONY BEFORE THE GRAND JURY AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The United States Court of Appeals for the Ninth Circuit has ruled in a published opinion that the Fifth Amendment Rights of a United States citizens are not violated when:

1. The government presents a material witness to the grand jury knowing the witness had been previously convicted of nine (9) felonies, and discontinued as an informant by the F.B.I. and D.E.A. because he was totally untrustworthy and unreliable without informing the grand jury of these facts; and

2. Government counsel knowingly condones the perjurious testimony of two Government witnesses and an F.B.I. agent before the grand jury on material matters and does nothing to correct that perjury before the grand jury returns an indictment.

There is a long line of cases in this Court which recognize the requirement of good faith on the part of the prosecutor with respect to the court, the grand jury, and the defendant. While the facts of these cases may not exactly parallel those of the instant case, their rulings regarding the consequences of a violation or abuse of this prosecutorial duty must be applied where the prosecutor with respect to the court, the grand jury, and the defendant. While the facts of these cases may not exactly parallel those of the instant case, their ruling regarding the consequences of a violation or abuse of this prosecutorial duty must be applied where the prosecutor has knowledge that testimony before the grand jury was unreliable or perjured. See *Mooney v. Holohan*, 294 U.S. 103 (1935); *Giles v. Maryland*, 386 U.S. 66 (1967); *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Hysler v. Florida*, 315 U.S. 411 (1942); *Pyle v. Kansas*, 317 U.S. 213 (1942).

In *Napue v. Illinois*, *supra* at 269-270 this Court reaffirmed the principal stated in many of its prior cases that:

> A conviction obtained through use of false evidence known to be such by representatives of the state must fall under the Fourteenth Amendment, [citations]. The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears [citations]. The principal that a state may not knowingly use false evidence including false testimony to obtain a tainted conviction, implicit in any concept of ordered liberty does not cease to apply merely because the false testimony goes only to the credibility of the witness.

While the court in *Napue*, *supra* held that the prosecution's use of false testimony at trial required reversal of the petitioner's conviction, the same result must obtain when the Government allows a defendant to stand trial on an indictment it knows to be based in part on unreliable or perjured testimony. The consequences of unreliable or

perjured testimony given before the grand jury may be even more severe than false testimony at trial. The defendant has no effective means of cross examining or rebutting perjury before the grand jury as he might do in trial before a court or jury.

This Court dealt with a somewhat analogous situation in *Mesarosh v. United States*, 352 U.S. 1 (1956) in which the Solicitor General, while a review of the petitioner's conviction was pending in this court, informed the court that one of the Government's witnesses at trial had testified falsely in other proceedings. While the Government believed that the witness' testimony at trial was truthful and credible, it suggested a remand to the District Court to determine the credibility of the witness' testimony. Solely on the basis of those representations by the Government, this Court reversed the convictions and ordered a new trial. This Court stated that:

> Mazzei [the witness], by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining if of all impurity . . . Pollution having taken place here, the condition should be remedied at the earliest opportunity.
>
> > " 'The untained administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts . . . [F]astidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.' *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 124, 76 S.Ct. 663, 668 [100 L.Ed. 1003]." (352 U.S. at 14.)

Permitting a defendant to stand trial on an indictment which the Government knows is based upon perjured testimony cannot comport with this "fastidious regard for the honor of the administration of justice."

This Court pursuant to its supervisory power should reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the prosecution to the United States District Court with directions to dismiss the indictment as an illustration of conduct which has no place in our system of jurisprudence.

II. THE PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN ALLOWING THE PROSECUTOR TO CONDONE THE USE OF UNRELIABLE AND PERJURED TESTIMONY BEFORE THE GRAND JURY HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

This Court has never sanctioned the condoning of perjured testimony before the grand jury by the prosecutor. Likewise, this Court has never sanctioned concealing from the grand jury that one of the primary witnesses has been recently determined to be thoroughly untrustworthy and unreliable by the D.E.A. and the F.B.I.

In that recent trilogy of cases dealing with grand jury abuse, *United States v. Mechanik*, 475 U.S. 66 (1986); *Midland Asphalt Corp. v. United States*, —— U.S. ——, 103 L.Ed.2d 879 (1989); *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), 108 S.Ct. 2369 this Court has ruled that certain types of misconduct do not warrant the reversal of a criminal conviction.

It has stated in *Midland Aspalt*, *supra*, that if it is established a "violation substantially influenced the grand jury's decision to indict or if there is grave doubt that the decision to indict was free from the substantial influence of such violations" dismissal of an indictment is appropriate. Such prejudice is present in this case.

This Court, in *Midland Asphalt*, *supra*, went on to describe situations in which "indictments are dismissed without a particular assessment of the prejudicial impact

of the errors in each case because the errors are deemed fundamental. These cases may be explained as isolated exceptions to the harmless error rule. We think, however, that an alternative and more clear explanation is that these cases are ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice [citations]"

For the Government to condone the use of perjured testimony and to conceal from the grand jury that one of its primary witnesses has been convicted of nine felonies (four while a government informant) and has been determined to be fully unreliable and untrustworthy by the D.E.A. and F.B.I. is to compromise the structural protections of the grand jury and render the proceedings fundamentally unfair without a measurement of prejudice.

The United States Court of Appeals for the Ninth Circuit ruled that concealing the use of unreliable testimony and condoning perjured testimony before the grand jury did not require reversal because it did not meet the requirements of *Bank of Nova Scotia v. United States.*

The dissenting opinion of Judge Pregerson answers the majority's ruling regarding prejudice at Appendix A 6342-6344 as does the prior discussion in this petition. This Court should rule that such governmental conduct is both intolerable and prejudicial and reverse the petitioner's conviction.

III. THE PUBLISHED DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND CONFLICTS WITH THE APPLICABLE DECISIONS FOR THIS COURT AS SAID DECISION VALIDATES USE OF GENERAL WARRANTS FOR TITLE III INTERCEPTIONS THAT INTERVENTION BY THIS COURT IS NECESSARY

The United States Court of appeals for the Ninth Circuit has made a very significant ruling regarding Title III intercepts. It states that if a Title III Application and Order contain "a statement of the particular offense to which the order relates" (18 USC § 2518(4)(c)) it will pass constitutional muster even if the executory portion of that order contains an authorization to intercept conversations related to any and all serious federal crimes.

The petitioner accepts that the Court of Appeals was correct in its determination that each of the wiretap orders included a statement of certain particular offenses to which the order related. However, in addition, each of said orders contained the following statement:

> The interceptions sought herein for a period of 30 days, are to be conducted under Section 2518 of Title 18 United States Code, *concerning the offenses enumerated in Section 2516 of the Titled 18 United States Code.*" (Emphasis supplied)

As acknowledged by the Court in its June 15, 1989, opinion, at Appendix A, page 6320, "Section 2516 lists every serious crime in the United States Code." If the orders authorized the executing officers to listen to conversations relating to every serious crime in the United States Code, without probable cause therefore, they constitute general warrants and should have been quashed. *Berger v. New York*, 388 U.S. 41, 44 (1967).

A simple example should serve to illustrate the petitioner's position herein. Assume a search warrant affidavit is prepared for the search of a residence for cocaine, narcotics paraphernalia, records of drug dealing, funds related to drug dealing and evidence of who, in fact, lives at the particular residence. Further, assume that this affidavit is replete with probable cause, but in the warrant itself, the serving officer is directed to search the subject premises for evidence of cocaine, narcotics paraphernalia, records of drug dealings, funds, who lives at the apartment, and any of the offenses enumerated in 18 U.S.C. Section 2516. Could anyone argue that this is not an impermissible general warrant?

The Court below held that a reading of the entire order and supporting application makes it clear that the subject wiretap is related only to the extortionate making and collecting of loans. However, actual wire interceptions, like actual searches, are not conducted by judges, lawyers, or other trained personnel, but rather by clerks who must be told precisely what they can and cannot do. In this case, it is clear the order authorizes interception of practically all known federal crimes and is therefore an impermissible general warrant.

This Court should not allow the use of general warrants in Title III intercepts and remand this prosecution back to the District Court with directions.

CONCLUSION

Judge Pregerson in his dissenting opinion at Appendix A, —, sets forth a conclusion which the petitioner adopts haec verba:

> The government's conduct in this case "has placed in jeopardy the integrity of the criminal justice system." [Citation omitted]. To allow the indictment against Spillone to stand in these circumstances

makes a mockery of the Fifth Amendment's grand jury requirement.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5037

D.C. No. CR-84-693-WMB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VITO SPILLONE,
Defendant-Appellant.

No. 86-5038

D.C. No. CR-84-693-WMB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN CLYDE ABEL,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge, Presiding

Argued and Submitted
March 7, 1989—Pasadena, California

No. 86-5043
D.C. No. CR-84-693-WMB-6

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK CITRO,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge, Presiding

Submitted March 7, 1989 *
Pasadena, California

Filed June 15, 1989

Before: Joseph T. Sneed, Jerome Farris and
Harry Pregerson, Circuit Judges.

Opinion by Judge Sneed; Partial Concurrence Partial
Dissent by Judge Pregerson

Richard G. Sherman, Santa Monica, California; Yolanda Barrera, Chief Federal Public Defender, Phillip A. Trevino, Deputy Federal Public Defender, David R. Evans, Los Angeles, California, for the defendants-appellants.

Louis M. Fisher, Appellate Section, Criminal Division, Department of Justice, Washington, D.C., for the plaintiff-appellee.

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* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

OPINION

SNEED, Circuit Judge:

Spillone, Abel, and Citro appeal their convictions for racketeering, extortionate extension of credit, and using extortionate means to collect extensions of credit. We affirm.

I.

FACTS AND PROCEEDINGS BELOW

These appeals arise from a twenty-two count indictment charging eight defendants with operating a loan sharking enterprise. Because none of the defendants challenges the sufficiency of the evidence, the facts will be recounted only briefly.

Defendants conducted a loan sharking business out of a licensed poker club in Bell, California. Spillone was the alleged leader of the group. Citro made loans and also collected payments. Abel also collected loan payments. The proceeds were turned over to Spillone who returned a percentage of the amount collected to each man. The group charged rates of five or ten percent interest per week.

Appellants and four others were charged with conducting an enterprise through a pattern of racketeering activity and conspiracy to conduct such an enterprise. *See* 18 U.S.C. § 1962(c)-(d) (1982). Spillone was also charged with two counts of making extortionate extensions of credit and one count of using extortionate means to collect extensions of credit. *See* 18 U.S.C. §§ 892, 894 (1982). He was convicted on all counts and sentenced to serve ten years and pay a $20,000 fine. In addition to the conspiracy count, Abel was charged with four counts of making extortionate extensions of credit and seven counts of using extortionate means to collect extensions of credit. He was acquitted of the RICO conspiracy count and one count of making an extortionate extension of credit; he

was convicted on all other counts. He was sentenced to serve five years. Citro was charged with six counts of making extortionate extensions of credit and five counts of using extortionate means to collect extensions of credit. He was also acquitted of the RICO conspiracy count and one count each of making an extortionate extension of credit and using extortionate means to collect an extension of credit. He was sentenced to serve two years.

II.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231 (1982). This court's jurisdiction rests on 28 U.S.C. § 1291 (1982).

III.

SPILLONE'S APPEAL

A. *Electronic Surveillance Orders*

This court reviews de novo whether a wiretap order complies with 18 U.S.C. § 2518 (1982 & Supp. V 1987). *See United States v. Brone*, 792 F.2d 1504, 1506 (9th Cir. 1986).

Spillone argues that the wiretap orders issued in this case did not comply with § 2518(4)(c) (1982) which requires that the order include "a statement of the particular offense to which [the order] relates." Three wiretap orders were issued in this case. Spillone objects to the portion of each order that provides: "The interceptions sought herein [are for investigations] . . . concerning the offenses enumerated in Section 2516 of Title 18, U.S.C." Section 2516 lists virtually every serious crime in the United States Code. *See* 18 U.S.C. § 2516 (1982 & Supp. V 1987)

We must look to the entire order to determine if it complies with the statute. *See United States v. Kalus-*

tian, 529 F.2d 585, 589 (9th Cir. 1975). We have never required wiretap orders to specify the particular crimes involved in exact detail. For example, in *United States v. Licavoli*, 604 F.2d 613, 620 (9th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980), the court considered an order authorizing interception of conversations concerning "receiving, concealing, . . . selling or disposing of goods . . . knowing the same to be stolen . . . in violation of Title 18, U.S.C. Section 2315." The defendant objected because the order did not limit the interception to conversations concerning stolen diamonds. The court held that the order complied with the statute. *Id.* In *United States v. Turner*, 528 F.2d 143, 153-55 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975), this court held that an order which identified conversations concerning "narcotics" was sufficient to satisfy the statute. *See also United States v. Carneiro*, 861 F.2d 1171. 1179 (9th Cir. 1988) (holding that wiretap order complied with statute when it specified the particular statutes being investigated and stated that the defendant was being investigated for distributing controlled substances).

In this case, the order was similar to the order approved in *Licavoli* and much more specific than the one approved in *Turner*. Spillone ignores that paragraph A of the order which listed the particular offenses which were being investigated and which included violations of the Hobbs Act, 18 U.S.C. § 1951 (1982), interstate travel in aid of extortion, 18 U.S.C. § 1852 (1982), extortionate credit transactions, 18 U.S.C. §§ 892-894 (1982), conspiracies to commit those offenses, 18 U.S.C. § 371 (1982), and a RICO violation, 18 U.S.C. § 1962 (1982). In addition, the May 12, 1981 order provided that "these wire and oral communications will concern racketeering activities involving extortion and murder . . . ." The two later wiretap orders followed the same format. The wiretap orders complied with the statute.

In addition to violating the statute, Spillone also argues that by failing to specify the offense, the wiretap

order violated the Fourth Amedment's prohibition against general warrants. In *Berger v. New York*, 388 U.S. 41, 58-59 (1967), the Court struck down a New York statute authorizing wiretaps, in part, because the statute did not require the court to specify the particular offense being investigated. This argument has no merit. By specifying the specific crimes being investigated, the warrant satisfied *Berger*.

B. *Counsel's Closing Argument*

Spillone next complains of the district court's interruption of his counsel's closing argument on seven occasions. The court instructed counsel not to interject his personal opinion into the argument and also prohibited counsel from using anecdotes and making analogies to well-known cases. Spillone has not cited any authority supporting his argument that this was reversible error.

"The trial court has broad discretion in controlling closing arguments, and, in the absence of an alleged violation of specific constittuional rights, we will apply an abuse of discretion standard of review." *United States v. Schuler*, 813 F.2d 978, 982 (9th Cir. 1987). The trial court has a duty to control final argument and to prevent any improper arguments. *See United States v. Young*, 470 U.S. 1, 9-10 (1985). The trial court did not abuse its discretion in requiring counsel to confine his remarks to the record and in prohibiting counsel from making references to other cases.

C. *Admission of Prior Conviction*

Next, Spillone objects to the admission of a prior conviction. In 1971 Spillone was convicted of making an extortionate extension of credit and sentenced to twelve years confinement. He was released on parole in 1976 and discharged in 1981. Prosecutors urged admission of Spillone's prior conviction on the grounds that it showed intent and knowledge. The district court agreed, despite Spillone's representations that he would not argue in-

tent. Spillone suggested that he would contend that the government's witnesses were fabricating their testimony. The district court gave a limiting instruction and then permitted the prosecutor to tell the jury that Spillone was convicted of extortionate extension of credit in 1971.

We review the trial court's decision to admit evidence of prior criminal acts under Fed. R. Evid. 404(b) for abuse of discretion. *United States v. Johnson*, 820 F.2d 1065, 1070 (9th Cir. 1987).

We use a four-part test to determine whether evidence is admissible under rule 404(b). *See United States v. Miller*. No. 86-5200, slip op. at 4247 (9th Cir. April 25, 1989). The government has the burden of proving that the evidence satisfied this test. *See United States v. Alfonso*, 759 F.2d 728, 739 (9th Cir. 1985). First, there must be sufficient evidence to support the jury's finding that the defendant committed the other crime. *Miller*, slip op, at 4247-48.[1] Spillone concedes that this is so. Second, the other crime must not be too remote. Spillone vigorously argues that the prior conviction was too remote because it was over ten years old.

Courts have seldom discussed the proper way to evaluate a defendant's objection that a prior bad act or conviction is too remote. The Seventh Circuit has suggested that remoteness must be considered in conjunction with other factors. "Questions about 'how long is too long' do not have uniform answers; the answers depend on the theory that makes the evidence admissible." *United States v. Beasley*, 809 F.2d 1273, 1277 (7th Cir. 1987). We agree with the Seventh Circuit and decline to adopt an inflexible rule excluding evidence of prior bad acts after a certain amount of time elapses. Depending upon the theory of admissibility and the similarity of the acts,

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[1] Prior Ninth Circuit cases required clear and convincing evidence of the prior act. *See, e.g., Alfonso*, 759 F.2d at 738. The Supreme Court rejected this standard in *Huddleston v. United States*, 108 S. Ct. 1496, 1499 (1987). Consequently, we have altered our four-part test to conform with *Huddleston*. *See Miller*, slip op. at 4249-50.

for example, some remote acts may be extremely probative and relevant. We note that other circuits have permitted the introduction of similar acts that are ten years old or older. *See, e.g., United States v. DeCastris*, 798 F.2d 261, 265 (7th Cir. 1986) (prior bad acts as old as ten years admissible to show a pattern); *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1075 (5th Cir. 1982) (one prior bad act occurring over ten years before admissible to prove knowledge); *United States v. Engleman*, 648 F.2d 473, 478-79 (8th Cir. 1981) (evidence of murder committed thirteen years ago admissible), *United States v. Lea*, 618 F.2d 426, 431 (7th Cir.) (prior similar scheme, occurring over ten years before, admissible to show intent and motive), *cert. denied*, 449 U.S. 823 (1980). *But see United States v. Davis*, 657 F.2d 637, 639-40 (4th Cir. 1981) (error to admit evidence that six to eleven years before, defendant sold heroin to children but error harmless in light of other evidence). Given the fairly close similarity of the offenses, *see infra*. Spillone's prior conviction was not so remote as to require its exclusion.

Similarity of the offenses is the third factor the trial court must consider. To be admissible under rule 404(b), the prior conduct need not always be similar, depending upon the theory of admissibility. *See Miller*, slip op. at 4248-49. When a prior act is admitted to prove intent, as here, the prior act must be similar. *Id.* at 4249. Spillone argues that there was no evidence that the two offenses have the required similarity.

As already indicated, we do not accept this position. Spillone's prior conviction was for making an extortionate extension of credit. *See* 18 U.S.C. § 892. In this case, he was charged with violating § 892 and the related § 894, which prohibits using extortionate means to collect extensions of credit. This court has upheld the admission of prior crimes, not only when the offenses charged were identical, as in *United States v. Winn*, 767 F.2d 527, 529 (9th Cir. 1985) (per curiam) (defendant's prior convic-

tion for aiding and abetting the transportation of illegal aliens was admissible in the defendant's trial for the same offense), but also when the prior conviction was for a similar offense. Thus, a prior conviction for making false statements and for mail and securities fraud was admissible in a defendant's trial for mail fraud and embezzlement. *See United States v. Evans*, 796 F.2d 264, 265 (9th Cir. 1986) (per curiam). We relied on the fact that the intent element was similar in each charge. *See id.* We hold that the third requirement was satisfied.

The last of the four requirements is that the prior act must be introduced in order to prove a material element of the case. Spillone acknowledges that the government stated that the prior conviction was admissible to prove intent and knowledge, but complains that this was insufficient. To satisfy this requirement, Spillone argues that the government had to articulate the precise evidentiary hypothesis, an essential part of which would be supplied by the prior conviction, to warrant the admission of the evidence. This court has not imposed such a strict requirement. *See United States v. Mehrmanesh*, 689 F.2d 822, 831 (9th Cir. 1982).

Intent was a material element of this case. Frequently, evidence of intent is circumstantial and less strong than it might be. Under these circumstances, courts permit the introduction of prior crimes. *See United States v. Harrod*, 856 F.2d 996, 1001 (7th Cir. 1988); *United States v. Scott*, 767 F.2d 1308, 1311 (9th Cir. 1985). These authorities justify our holding that the fourth requirement was satisfied.

Finally, after considering all these factors, the district court must weigh the probative force of the evidence against its prejudicial effect. *See Miller*, slip op. at 4248. We do not disagree with the trial court's conclusion that the probative force was sufficient to overcome the prejudice to the defendant. The court prudently gave a limiting instruction in order to minimize the prejudicial effect. Spillone simply asserts that his prior conviction has no

"logical connection" to any crime being charged. Spillone overlooks that the crucial issues in cases involving § 892 and § 894 are the debtor's knowledge that failure to repay the loan will result in harm to him and the defendant's knowing use of extortionate means to collect the loans, respectively. A defendant's prior conviction under § 892 has a clear logical connection to the issue of his knowledge and intent in this case. The district court did not abuse its discretion in admitting this evidence.

D. *Prosecutorial Misconduct*

We now turn to the more troublesome issues raised by Spillone. Spillone makes numerous allegations of prosecutorial misconduct that he argues warrants dismissal of the indictment.

1. *Standard of Review*

The proper standard for reviewing the district court's refusal to dismiss an indictment for prosecutorial misconduct is not clear. There exist two distinct lines of authority, one suggesting de novo, the other abuse of discretion, review. *Compare United States v. Benjamin*, 852 F.2d 413, 415 (9th Cir. 1988) (de novo review) *and United States v. De Rosa*, 783 F.2d 1401, 1404 (9th Cir.) (same), *cert. denied*, 477 U.S. 908 (1986) *with United States v. Gonzalez*, 800 F.2d 895, 899 (9th Cir. 1986) (abuse of discretion standard of review) *and United States v. Noti*, 731 F.2d 610, 613 (9th Cir. 1984) (same).[2]

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[2] The case first suggesting de novo review was *De Rosa*. *De Rosa*, in turn, relied upon a footnote in *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386 (9th Cir. 1983). The court observed that it would review the district court's "legal conclusions that Sears' Fifth Amendment rights were violated" de novo. *Id.* at 1392 n.9. This statement is, of course, correct. *See United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). However, it is not clear that the court in *De Rosa* correctly interpreted this statement to mandate de novo review of the district court's refusal to dismiss the indictment.

We hold the de novo standard is the appropriate one. This is because the issue presents a mixed question of both law and fact. First, the trial court must determine whether the defendant's allegations of misconduct are true—a purely factual inquiry. Next, it must determine whether the prosecutor's conduct violated the Constitution or whether the misconduct was so serious that dismissal is warranted. This latter inquiry is a question of law. In *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984), we discussed the proper standard of review for mixed questions at great length and concluded that in most instances mixed questions of law and fact should be reviewed de novo. *See id.* at 1202-03. The court noted, however, that de novo review is inappropriate (1) for deciding whether "established facts constitute negligence," and (2) for deciding questions "in which the applicable legal standard provides for a strictly factual test." *Id.* at 1204. Neither exception is applicable here; therefore, we shall employ a de novo standard of review.

2. *United States v. Mechanik*

The government argues that any prosecutorial misconduct became harmless after Spillone's conviction, citing *United States v. Mechanik*, 475 U.S. 66 (1986). Mechanik appealed his conviction, arguing that the district court erred in denying his motion to dismiss the indictment. He argued that the government violated Fed. R. Crim. P. 6(d) by allowing two witnesses to testify simultaneously before the grand jury. The Supreme Court held that any error became harmless when the defendant was convicted by a jury. Rule 6(d), the Court reasoned, was designed to insure that there is probable cause to indict, but the petit jury's verdict had demonstrated that probable cause existed. *Id.* at 70. Further, the Court reasoned that the

> societal costs of reversal and retrial are an acceptable and often necessary consequence when an error

> in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has no effect on the outcome of the trial.

Id. at 72.

Since *Mechanik* the federal courts of appeal have struggled to define what non-trial errors remain reviewable after a defendant has been convicted. For a brief period there burned brightly the prospect of utilizing interlocutory appeals to vindicate claims that arguably would be barred from post-conviction review by *Mechanik*. *See United States v. Benjamin*, 812 F.2d 548, 550-54 (9th Cir. 1987). This prospect was extinguished by *Midland Asphalt Corp. v. United States*, 109 S. Ct. 1494, 1498 (1989). Interlocutory appeals in criminal proceedings were severely limited.

While *Mechanik* and *Midland Asphalt* considered together seem clear enough, this clarity is diminished when *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369 (1988), is added to the mix. Uncertainty arises because *Bank of Nova Scotia* can be read as requiring appellate courts in reviewing convictions to assess claims of prosecutorial misconduct in the grand jury proceedings by the standard Justice O'Connor employed in her concurring opinion in *Mechanik*. That is, "dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict' or if there is 'grave doubt' that the decision to indict was free from substantial influence of such violations." *Bank of Nova Scotia*, 108 S. Ct. at 2374 (quoting *Mechanik*, 475 U.S. at 78 (O'Connor, J., concurring)). This standard, however, was explicitly rejected by *Mechanik*. *See* 475 U.S. at 71, 73.

It is, of course, possible to read *Bank of Nova Scotia* as applicable only to situations in which prosecutorial

abuse of grand jury proceedings serves as the basis of a request to a trial court "to dismiss an indictment prior to the conclusion of the trial." 108 S. Ct. at 2374. Under these circumstances, the standards employed by Justice O'Connor become the heart of the harmless error rule, the relevant content of Fed. R. Crim. P. 52(a). An appellate court, however, reasonably could review the trial court's decision after conviction *only* by using, to some degree in any event, the same standard. Thus, once more *Bank of Nova Scotia* brushes against *Mechanik.*

Despite our uncertainty, we shall apply Justice O'Connor's standard in evaluating prosecutorial misconduct allegations as they relate to violations of the rules governing grand jury proceedings as well as the standard of fundamental fairness that we employed in *United States v. Howard*, 867 F.2d 548, 551-52 (9th Cir. 1989).[3] While this standard may not be identical to the "fundamental" fairness standard that the Court in *Bank of Nova Scotia* recognized as justifying a presumption of prejudice, *see* 108 S. Ct. at 2375, its resemblance is close enough to warrant its continued use by this court.[4]

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[3] In *Howard*, 867 F.2d at 551-52, we held that after conviction, a defendant could no longer challenge any errors associated with the grand jury charging process but remained free to raise objections to the fundamental fairness of the grand jury proceedings. *See also United States v. Eccles*, 850 F.2d 1357, 1364 (9th Cir. 1988) ("[P]ost-conviction review remains available under *Mechanik* . . . where the defendant has alleged prosecutorial misconduct that does impliciate substantial rights protected by the due process clause.").

[4] Other courts have responded in a similar fashion. *See, e.g., United States v. Friedman*, 854 F.2d 535, 583 (2d Cir. 1988) (distinguishing between violations like those in *Mechanik* and misconduct that " 'deprive[s] [the] defendant of a fair determination of his guilt or innocent,' " *quoting Mechanik*, 475 U.S. at 72), *cert. denied*, 109 S. Ct. 1637 (1989); *United States v. Hooker*, 841 1225, 1231 (4th Cir. 1988) (en banc) (error not harmless when it affects "substantial rights"); *United States v. Giorgi*, 840 F.2d 1022, 1030 (1st Cir. 1988) (distinguishing between "technical violations" and "claims of fundamental fairness"); *United States v. Taylor*, 798

We now turn to Spillone's allegations to determine which should be governed by *Mechanik* and which, if any, might implicate either Justice O'Connor's standards, the fundamental fairness of the grand jury proceeding standard, or the ordinary harmless error standard.

3. *Delay in Producing Exculpatory Evidence*

Spillone's first allegation does not pertain to the grand jury proceedings. He alleges that exculpatory testimony appearing in the grand jury transcripts of witnesses Creditor and Spalliero was withheld from defense counsel in violation of the court's discovery orders and *Brady v. Maryland*, 373 U.S. 83 (1963). Spillone concedes that after an *in camera* inspection, the district court ordered the transcripts released several months before trial. The district court found that prosecutors did not deliberately misrepresent the existence of this exculpatory evidence. Spillone has not suggested that he has suffered any prejudice as a result of the delay.

To ask for a dismissal of the indictment on this ground is unwarranted. In essence, Spillone is asking this court to dismiss the indictment as a sanction against the government for failing to comply with its duty to disclose exculpatory evidence. While a district court has broad discretion to fashion remedies for the violation of its discovery orders, that discretion in this case was properly exercised by refusing to dismiss the indictment. The exculpatory evidence was disclosed months before trial. Any prejudice was not sufficient to warrant dismissal of the indictment in any event.

F.2d 1337, 1340 (10th Cir. 1986) (stating that claims implicating the "fundamental fairness" of the criminal proceeding would remain reviewable despite *Mechanik*). *But see United States v. Fountain*, 840 F.2d 509, 515 (7th Cir.) (rejecting any distinction between technical violations and more serious errors), *cert. denied*, 109 S. Ct. 533 (1988).

4. *Superseding Indictment*

Spillone next complains of the manner in which the government obtained the superseding indictment. The superseding indictment, according to the government, "corrected" some of the dates in the first indictment. FBI Agent Wiechert was the only witness to appear befor the grand jury that issued the second indictment. Wiechert testified that certain witnesses were "confused" about their recollection of certain dates. The district court held that there was no misconduct because the grand jury was told it could recall any witness and because the government provided transcripts of the witness' testimony to it. The government argues that any error was harmless under *Mechanik*. We agree.

The issue of whether Wiechert's testimony was correct or incorrect has been affirmatively answered by the petit jury's verdict. In a similar situation, the Eighth Circuit held that such an impropriety was made harmless by the defendant's conviction. *See United States v. Kouba*, 822 F.2d 768, 773-74 (8th Cir. 1987); *see also United States v. Hintzman*, 806 F.2d 840, 843 (8th Cir. 1986) (holding that any error by prosecutor and government witness in misleading grand jury was harmless under *Mechanik*).

Furthermore, we are confident that recourse to Justice O'Connor's standard adopted by *Bank of Nova Scotia* or to this court's standard employed in *Howard* would not alter this result.

5. *Angelo's Testimony*

Spillone's third set of allegations concerns the testimony of government informant Johnny Angelo. Spillone challenges the government's use of Angelo's testimony both before the grand jury and to obtain the wiretap orders. Spillone claims that the government improperly failed to reveal Angelo's long criminal record to the grand jury and failed to reveal that he received a reduced sen-

tence on another charge in exchange for his testimony. He also suggests that Angelo perjured himself before the grand jury when he testified that he was not a paid government informant when he was working with Spillone and became a government informant only after he learned that Spillone had hired someone to kill him. Spillone argues that the perjury was compounded by FBI Agent Wiechert who also testified that Angelo was not an informant during his dealings with Spillone. Spillone also alleges that the government agents concealed efforts taken on Angelo's behalf to secure good time credit for him in California state court and that the grand jury was not informed that the FBI and DEA had terminated Angelo as an informant because he was untrustworthy and unreliable. Finally, as in the case of the exculpatory transcripts of Creditor and Spalliero, the government failed to reveal exculpatory statements made by Angelo until the district court ordered the information released after an *in camera* inspection. Angelo never testified at trial.

The district court held two hearings on these allegations. The district court examined the transcript of the hearing in state court concerning Angelo's good time credit. The court concluded that the government had no obligation to present matters bearing on Angelo's credibility to the grand jury. The court also held that the revelations about Angelo and Wiechert's reliance on his assertions did not require an evidentiary hearing on the sufficiency of the affidavits supporting the wiretap orders. *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

Another hearing was held after Spillone was convicted. Angelo, who had left the witness protection program, submitted an affidavit in which he claimed that he did not make certain statements attributed to him by Agent Wiechert in the wiretap affidavit. He also claimed that FBI agents instructed him to lie to the grand jury. Later Angelo wrote the district court and said that his affidavit was false. He testified at the hearing but at first

invoked his Fifth Amendment privilege. After reconsidering, he did testify. He took issue with some of statements attributed to him in the wiretap affidavit but said that he testified truthfully before the grand jury. After this testimony, the district court denied Spillone's renewed motion to dismiss the indictment and again refused to hold a *Franks* hearing. The district court specifically found that Angelo was not a credible witness.

Spillone does not contest the district court's failure to hold a *Franks* evidentiary hearing. Thus, he has waived any complaint concerning the wiretap affidavit.

Angelo never testified at trial and when the government realized that he would not appear as a witness at trial, the government struck two of the overt acts in the indictment. Nonetheless, Spillone was convicted by the petit jury. There was sufficient evidence, aside from Angelo's testimony, to support the conviction. This indicates that any error in presenting the case to the grand jury should be considered harmless under *Mechanik*.

The result is no different when Justice O'Connor's *Bank of Nova Scotia* standard is employed or our *Howard* standard is used. In the first place, some of these allegations regarding Angelo's role are not examples of prosecutorial misconduct. A prosecutor has no duty to present evidence bearing on witness credibility to the grand jury. *See, e.g., United States v. Busher*, 817 F.2d 1409, 1411 (9th Cir. 1987). Thus, there is no error in the government's failure to tell the grand jury that Angelo had an extensive criminal record or that he had been terminated as an informant by the FBI and DEA. Similarly, the government's failure to disclose efforts undertaken to insure that Angelo received good time credit for his testimony need not be presented to the grand jury because it also bears on his credibility.

The government's delay in producing the exculpatory portions of Angelo's grand jury testimony also is not grounds for dismissal of the indictment. As in the case

of the transcripts of Creditor and Spalliero, the defendants received this information well before trial and therefore the district court did not err in refusing to dismiss the indictment. *See supra* at 6330.

Spillone's allegations that Angelo perjured himself before the grand jury in testifying about when he became a government informant require resort to Justice O'Connor's standard, as developed in *Bank of Nova Scotia*, and our *Howard* standard. This is particularly true because Agent Wiechert's testimony confirmed Angelo's incorrect version of the facts. *See United States v. Basurto*, 497 F.2d 781, 785-86 (9th Cir. 1974) (prosecutor's knowing use of perjured testimony to the grand jury violated the Fifth Amendment's guarantee of due process). Thus, we decline to invoke *Mechanik* solely.

Nonetheless, we hold that the alleged perjury did not "substantially influence the grand jury's decision to indict" nor conflict with the "fundamental fairness" standard of *Howard*. We commence with the proposition that dismissal of the indictment is not warranted when a witness' alleged perjury is not material to the defendant's indictment and instead affects only the witness' credibility. *See United States v. Flake*, 746 F.2d 535, 539 (9th Cir. 1984), *cert. denied*, 469 U.S. 1225 (1985); *see also United States v. Levine*, 700 F.2d 1176, 1180 (8th Cir. 1983) (false testimony must be material to warrant dismissal of the indictment); *United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977) (same), *cert. denied*, 435 U.S. 944 (1978). Angelo's perjury related to his assertions that he did not become a government informant until after his dealings with Spillone. This clearly affects only Angelo's credibility. Thus, the district court properly refused to dismiss the indictment.

Nor does Agent Wiechert's confirmation of this erroneous testimony warrant dismissal of the indictment. Not all erroneous statements of government agents warrant dismissal of the indictment. *See, e.g., United States v.*

Gonzalez, 800 F.2d 895, 899 (9th Cir. 1986); *United States v. Seifert*, 648 F.2d 557, 564 (9th Cir. 1980). This evidence was not sufficiently material to justify holding that it substantially influenced the grand jury's decision to indict. Nor does Angelo's and Wiechert's failure to identify the correct point at which Angelo became a government informant enable us to say that the indictment should be set aside to serve the ends of fundamental fairness.

6. *Minster's Testimony*

The final allegations of government misconduct concern government witness Irving Minster. Minster perjured himself before the grand jury by denying that he was a loan shark at the Bell Club before the defendants took over all loan sharking activity. Spillone alleges that the government knew of this perjury because it had sought a search warrant for Minster's home in order to recover evidence of loan sharking. The search warrant was under seal. FBI Agent Wiechert, who directed that the search warrant be prepared, testified that he had "forgotten" about the search warrant and, as a consequence, the prosecutors were caused to not reveal this exculpatory information to the defendants.

At trial, Minster once more denied making any loans. The FBI's evidence contradicted this assertion. Agent Wiechert testified that conversions recorded by the FBI indicated that Minster was a loan shark. The district court at this point directed the government to produce the search warrant and affidavit. The court released it to the defendants but again refused to dismiss the indictment. Although the court doubted Wiechert's claim of memory loss, the court specifically found that prosecutors did not withhold this evidence. Weichert testified that he told the prosecutor that the Minster search warrant involved a "collateral matter." The court also found that the defendants had sufficient time to use the evidence to im-

peach Minster and that the *Brady* violation did not warrant dismissal of the indictment. The court further refused to dismiss the indictment based on the grand jury testimony because the court found there was sufficient evidence to support the indictment without Minster's testimony.

The government argues that any misconduct was harmless. Construing the term "harmless" as defined in *Bank of Nova Scotia*, we agree. The actions of the government and Minster's perjury did not substantially influence the decision to indict. The district court also specifically found that the prosecutors were not aware of Minster's perjury. *See United States v. Cady*, 567 F.2d 771, 776 (8th Cir. 1977) (dismissal of indictment is not warranted in absence of evidence of "gross purposeful deception by the prosecutor"), *cert. denied*. 435 U.S. 944 (1978). The district court did not act contrary to fundamental fairness in refusing to dismiss the indictment.

Finally, the government's delay in producing the search warrant does not require dismissal of the indictment. *Brady* was not violated under the circumstances of this case. *See United States v. Browne*, 829 F.2d 760, 765 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1298 (1988).

7. *Cumulative Effect*

Spillone next resorts to the cumulative effect argument. He contends that while any one of these instances of prosecutorial misconduct may not be sufficient to warrant dismissal of the indictment, their cumulative effect is sufficient. *See United States v. Samango*, 607 F.2d 877, 884 (9th Cir. 1979).

We disagree. Assuming those facts most favorable to Spillone, he has demonstrated that Angelo and Minster misled the grand jury about their own activities and Agent Wiechert failed to identify correctly when Angelo became a government agent. The testimony of neither witness related to the specific allegations against Spillone.

We cannot conclude either that the cumulative effect of this misconduct substantially influenced the grand jury's decision to indict Spillone or that it imparted to the grand jury proceedings an aura of fundamental unfairness.

IV.

ABEL AND CITRO's CHALLENGE TO THE JURY INSTRUCTIONS

Abel challenges the trial court's refusal to include three jury instructions, and Citro complains of the district court's refusal to include two instructions.

Our standard of review generally is abuse of discretion. *United States v. Echeverry*, 759 F.2d 1451, 1455 (9th Cir. 1985). Jury instructions are considered as a whole to determine if they are misleading or inadequate. *United States v. Burgess*, 791 F.2d 676, 680 (9th Cir. 1986). However, whether a jury instruction misstated elements of a statutory crime is a question of law and is reviewed de novo. *United States v. Douglass*, 780 F.2d 1472, 1475 (9th Cir. 1986).

A. *The 18 U.S.C. § 892 Counts*

Citro and Abel raise two objections to the trial court's instructions on the extortionate extensions of credit counts.

First, Citro contends that the district court erred in failing to instruct the jury that it was required to find that the victim feared the defendants and that their fear was reasonable under the circumstances.

Section 892(a) prohibits anyone from making extortionate extensions of credit. "An extortionate extension of credit is any extension of credit with respect to which it is the *understanding* of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence

. . . ." 18 U.S.C. § 891(6) (1982) (emphasis added). The crucial element of the statute is the *understanding* of the debtor and the defendant creditor. The statute, by its terms, does not require proof that the victim, aware of the possibility of violence being employed to collect, in fact, feared the defendant. *See United States v. Dennis*, 625 F.2d 782, 803 (8th Cir. 1980); *see also* Goldstock & Cohen, *Controlling the Contemporary Loanshark: The Law of Illicit Lending and the Problem of Witness Fear*, 65 Cornell L. Rev. 127, 172 (1980) ("The important element is thus not fear, but only an awareness that the transaction was backed by implicit threats of violence."). Although proof of the victim's fear certainly would constitute probative evidence of an understanding by the debtor that the threat of violence existed, such proof is not required. It is the mutual understanding of the parties to the transaction that failure to repay could lead to violence, not fear the violence, that the statute requires. *See, e.g., United States v. Curcio*, 712 F.2d 1532, 1544 (2d Cir. 1983); *United States v. Benedetto*, 558 F.2d 171, 177 (3d Cir. 1977); *United States v. Nakaladski*, 481 F.2d 289, 297 (5th Cir.), *cert. denied*, 414 U.S. 1064 (1973). The district court did not err in refusing to include Citro's proposed jury instructions.

Abel's argument, that § 892(b)(3) *requires* proof of the debtor's understanding that the threat of violence exists be reasonable, fares no better. This argument is contradicted by the language of the statute. Section 892(a) defines the offense. Section 892(b), on the other hand, lists four factors which, if proved, constitute a prima facie case. Abel's contention that the debtor's understanding must be reasonable is derived from the third part of § 892(b) which provides: "At the time the extension of credit was made the debtor *reasonably* believed that either (A) one or more extensions of credit . . . had been collected or attempted to be collected by extortionate means . . .; or (B) the creditor had a reputation for the use of extortionate means to collect extensions of credit . . . ."

18 U.S.C. § 892(b)(3) (emphasis added). The statute explicitly states that this method of proof is *not* exclusive and does not limit the more general language of § 892(a). *See* 18 U.S.C. § 892(b). Thus, Abel is incorrect in asserting that § 892(a) requires proof that the debtor's understanding be reasonable.

B. *The 18 U.S.C. § 894 Count*

Section 894 prohibits the knowing use of "any extortionate means" to collect an extension of credit, 18 U.S.C. § 894(a). "Extortionate means" is defined as "any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person." 18 U.S.C. § 891(7) (1982). The court instructed the jury that "[a]cts or statements constitute a threat under law if they are calculated to instill fear in the person to whom they are directed in light of the surrounding circumstances."

Abel argues that because the statute requires a "knowing" use of extortionate means, the statute must also require that the debtor reasonably apprehend that the use of extortionate means of collection is contemplated. In this way Abel seeks to shift the focus of the statute from the creditor to the debtor.

In *United States v. Polizzi*, 801 F.2d 1543 (9th Cir. 1986), we rejected a similar effort. Polizzi argued that the district court erred in refusing to instruct the jury that, in order to find the defendants guilty, the evidence had to show that "an ordinary person would have been put in fear of immediate bodily or economic harm . . . ." *Id.* at 1547. The court held that the instruction was not required because the focus of § 894 was the *defendant's* knowing use of extortionate means to collect extensions of credit, not the consequent fear of the debtor. 801 F.2d at 1548; *see United States v. Sears*, 544 F.2d 585, 588 (2d Cir. 1976). The gravamen of a § 894 offense is the

defendant's state of mind, not that of the victim debtor. *See, e.g., United States v. Natale*, 526 F.2d 1160, 1168 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *Nakaladski*, 481 F.2d at 298; *United States v. DeStefano*, 429 F.2d 344, 347 (2d Cir. 1970), *cert. denied*, 402 U.S. 972 (1971). Thus, there was no error in refusing to include Abel's proposed instruction.

Citro's arguments to a degree are the converse of Abel's. He contends that the trial court should have given his proposed instruction which stated that "[f]ear must be the knowing and intentional result of the defendant's act." While he admits that the trial court properly instructed the jury on the elements of the statute, he contends that the government improperly emphasized the fear created in the victim whereas the focus of § 894 is on the defendant's intent to create fear.

The trial court's instructions did make clear that § 894 requires that the defendant intend to instill fear in the victim. The trial court instructed the jury that "[a]cts or statements constitute a threat under law if they are calculated to instill fear in the person to whom they are directed . . . ." It also instructed the jury that it must find that "the defendant expressly or implicitly threatened the use of violence or other criminal means to cause harm . . . ." Finally, the court instructed the jury that the "existence of actual fear in the mind of the debtor" was not an element of the crime. These instructions thoroughly explained the elements of § 894. They foreclosed the possibility that proof of a frightened debtor, cowed by a creditor's scowls, alone is sufficient to justify a conviction under § 894.

C. *The 18 U.S.C. § 1962(c) Count*

Finally, Abel argues that if this court finds that the court's instructions were inadequate, his RICO conviction must also be reversed. Because we conclude that the instructions were adequate, we need not reach this contention.

V.

CITRO'S APPEAL

A. *Claire Ellis' testimony*

Citro complains of the trial court's refusal to strike a portion of Claire Ellis' testimony. Claire Ellis testified that she received two loans from Citro. She requested a third but Citro refused, telling her that people who did not repay their loans "get taken care of." She testified that this statement frightened her. Later, Citro, in a "demanding" voice, told Ellis that he would like her to follow him home. She testified that although she tried to put him off, she went to Citro's home. The prosecutor then asked what happened next. After a bench conference, the trial court refused to allow Ellis to testify about subsequent events. The court denied a motion for a mistrial and, later, a motion to strike the testimony. Citro, aware of the potentially prejudicial effect of a part of the story, and not being prepared to divulge it all, urges that the entire story be striken. He claims that this testimony implied that he raped Ellis and therefore its admission violated Fed. R. Evid. 404(b).

We review a trial court's admission of evidence for abuse of discretion. *See United States v. Gwaltney*, 790 F.2d 1378, 1382 (9th Cir. 1986), *cert. denied*, 479 U.S. 1104 (1987). The erroneous admission of evidence does not require reversal of the defendant's conviction unless, more probably than not, the error materially affected the jury's verdict. *United States v. Valle-Valdez*, 554 F.2d 911, 915-16 (9th Cir. 1977).

We have not found any case in which a court discusses the admission of testimony that *implicitly* suggests that the defendant committed another crime or bad act. Citro cites *United States v. Dunn*, 805 F.2d 1275 (6th Cir. 1986), to support his argument. *Dunn*, however, is inapposite. The witness there testified that the defendant,

who was charged with mail fraud, was stealing eggs he was supposed to be selling under an exclusive contract. *Id.* at 1277-78. The entire story was admitted; nothing was left to the jury's imagination. Knowledge of wrongdoing is more prejudicial than mere suspicion of it—at least under the circumstances of the case before us.

We conclude that any error in the admission of this evidence was harmless. There was extensive testimony by the victims of the loan sharking enterprise about borrowing money from Citro, about the various interest rates charged, and about the threats made. Claire Ellis' testimony was only cumulative.

B. *Definition of "collection"*

Finally, Citro argues that it was plain error for the district court not to define collection as used in the RICO counts. " 'A plain error is a highly prejudicial error affecting substantial rights.' " *United States v. Bustillo*, 789 F.2d 1364, 1367 (9th Cir. 1986) (quoting *United States v. Giese*, 597 F.2d 1170, 1199 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979)). We reject this contention.

Citro cites *United States v. Pepe*, 747 F.2d 632 (11th Cir. 1984), as support for his position. In *Pepe*, the Eleventh Circuit approved giving a definition of collection as part of the jury instruction under § 894. *Id.* at 674 & n.77. The district court in this case used the same instruction. Citro apparently complains of the court's failure to repeat the instruction or cross-reference it in the RICO counts. The failure to cross-reference this definition did not prejudice the defendant's "substantial rights."

AFFIRMED.

PREGERSON, Circuit Judge, concurring in part and dissenting in part.

While I concur in part in the majority opinion, I dissent from Part III.D.5 because I believe that Johnny Angelo's perjury—which was compounded by FBI Agent Wiechert's corroborating testimony and the prosecutor's misleading statements to the grand jury—coupled with the government's knowing presentation of an untrustworthy and unreliable witness to the grand jury require dismissal of the indictment against Spillone. I also dissent from Part III.D.7 of the majority opinion because I believe that the cumulative effect of the government's misconduct requires dismissal of Spillone's indictment.

I. ANGELO'S TESTIMONY

The majority concludes that the prosecutorial misconduct concerning Angelo's testimony before the grand jury was, at best, harmless error which did not warrant dismissal of the indictment against Spillone. I strongly disagree. The government used Angelo as a grand jury witness even though it knew that he was so untrustworthy and unreliable that the DEA and the FBI had terminated him as an informant. The majority states that the government has no duty to disclose information to the grand jury regarding the credibility of witnesses. But for the government to bring a witness before the grand jury in an effort to get an indictment returned against Spillone, knowing all the while that the witness is wholly unreliable, goes beyond nondisclosure of evidence regarding the credibility of witnesses. The government's actions in this regard undermined the fundamental fairness of the grand jury proceedings. *See United States v. Howard*, 867 F.2d 548, 551-52 (9th Cir. 1989) (indictment is subject to dismissal when defendant's allegations challenge the fundamental fairness of the criminal proceedings).

In addition, Angelo committed perjury before the grand jury by falsely testifying that he did not become a gov-

ernment informant until after his involvement with Spillone had ceased. In fact, Angelo had been a paid informant throughout his dealings with Spillone. The government not only knew that Angelo's testimony was false and failed to disclose that fact to the grand jury, but FBI Agent Wiechert's testimony compounded Angelo's perjury by confirming Angelo's false version of the facts. The harm caused by Angelo's perjury was further compounded by the prosecutor's statements to the grand jury that implied that Angelo had not been an informant during his involvement with Spillone. The harm was likewise compounded by the prosecutor's statement that the government had not made any deals with Angelo, when the government in fact had paid him a high salary as an informant and had assisted him in obtaining good credit in his state court convictions.

We have held that due process is violated when a defendant has to stand trial on an indictment that the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached. *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974). "Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court and opposing counsel—and, if the perjury may be material, also the grand jury—in order that appropriate action may be taken." *Id.* at 785-86. We based our decision in *Basurto* "on a long line of cases which recognize the existence of a duty of good faith on the part of the prosecutor with respect to the court, the grand jury, and the defendant." *Id.* at 786.

In the present case, Angelo's perjury went to the heart of his testimony and was amplified by the fact that the perjury was corroborated by a government agent and was implicitly confirmed by the prosecutor. Thus, Angelo's perjury was certainly material in that it cannot be said that the grand jury's decision to indict was not

influenced by the perjury and the accompanying misconduct. *See Bank of Nova Scotia v. United States*, 108 S. Ct. 2369, 2374 (1988) (indictment must be dismissed if " 'it is established that [prosecutorial misconduct] substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations") (quoting *United States v. Mechanik*, 475 U.S. 66, 78 (1986) (O'Connor, J. concurring)).

The grand jury stands as a shield between the government and the accused. When the government, in an effort to secure an indictment, knowingly brings a totally unreliable witness before the grand jury, and when that witness perjures himself and the government corroborates that perjury, the whole judicial process is corrupted. Because, in this case, the grand jury's decision to indict could not help but be substantially influenced by this misconduct, and because the misconduct undermined the fundamental fairness of the grand jury proceedings, Spillone's indictment should have been dismissed. *See Bank of Nova Scotia*, 108 S. Ct. at 2374; *Howard*, 867 F.2d at 551-52.

II. CUMULATIVE EFFECT

During the grand jury proceedings that led to Spillone's indictment, the government engaged in numerous instances of prosecutorial misconduct. This misconduct included the government's failure to comply with its duty to produce exculpatory evidence until ordered to do so by the district court; the cursory manner in which the government obtained the superseding indictment against Spillone, with FBI Agent Wiechert as the sole witness; the government's misconduct relating to Angelo's testimony, as discussed above; and, finally, grand jury witness Irving Minster's perjury before the grand jury, of which the government was aware yet failed to disclose.

It is true that each of these acts of misconduct (other than the misconduct regarding Angelo's testimony dis-

missed above), standing alone, might not be so severe as to require dismissal of the indictment. However, the cumulative effect of the government's repeated acts of misconduct precludes a finding of harmless error and requires dismissal of the indictment against Spillone. *See United States v. Samango*, 607 F.2d 877, 884 (9th Cir. 1979) (cumulative effect of government's "errors and indiscretions, none of which alone might have been enough to tip the scales, operated to the defendant's prejudice by producing a biased grand jury").

The many instances of prosecutorial misconduct in this case robbed the grand jury proceedings of their integrity and, taken together, violated Spillone's due process rights by undermining the fundamental fairness of the proceedings. *Howard*, 867 F.2d at 551-52. In addition, based on the cumulative effect of the various acts of misconduct, it is highly unlikely that the grand jury's decision to indict Spillone was free from the substantial influence of that misconduct. *Bank of Nova Scotia*, 108 S. Ct. at 2374.

III. CONCLUSION

The government's conduct in this case "has placed in jeopardy the integrity of the criminal justice system." *Samango*, 607 F.2d at 884. To allow the indictment against Spillone to stand in these circumstances makes a mockery of the Fifth Amendment's grand jury requirement.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5037

DC# CR-84-693-WMB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VITO SPILLONE,
Defendant-Appellant.

ORDER

[Filed Feb. 12, 1990]

Before: SNEED, FARRIS, and PREGERSON, Circuit Judges.

The majority of the panel as constituted in the above case has voted to deny the petition for rehearing.

The full court was advised of the suggestion for en banc rehearing, and an active judge of the court requested that a vote be taken on the suggestion. A majority of the active judges voted against en banc consideration. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-790

VITO SPILLONE,

Petitioner

v.

UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 12, 1990.

/s/ Sandra Day O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 14th day of May, 1990.

APPENDIX D

CONSTITUTIONAL PROVISIONS INVOLVED

[AMENDMENT IV]

[Security from Unwarrantable Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[AMENDMENT V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

No. 89-1924

In the Supreme Court of the United States

OCTOBER TERM, 1990

VITO SPILLONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government presented perjured testimony to the grand jury, and if so, whether petitioner's indictment should therefore have been dismissed.

2. Whether the electronic surveillance orders in this case met the particularity requirements of 18 U.S.C. 2518(4)(c) and the Fourth Amendment.

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No. 89-1924

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 879 F.2d 514.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1989. A petition for rehearing was denied on February 12, 1990 (Pet. App. 31a). On May 14, 1990, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including June 12, 1990 (Pet. App. 32a), and the petition was filed on June 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conducting the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(c)), and conspiring to commit that offense (18 U.S.C. 1962(d)). He also was convicted on two counts of making extortionate extensions of credit (18 U.S.C. 892) and on one count of using extortionate means to collect extensions of credit (18 U.S.C. 894).[1] He was sentenced to ten years' imprisonment and a $200,000 fine. The court of appeals affirmed. Pet. App. 1a-30a.

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner ran a loansharking operation in the Los Angeles area between October 1980 and December 1981. Petitioner headed the organization; co-defendants Frank Citro and Frank Serrao and co-conspirator Raymond Cohen made the actual loans to the organization's victims;

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[1] Prior to trial, the government dismissed a charge of possessing firearms after a previous felony conviction (18 U.S.C. App. 1202(a)(1) (1982)). Petitioner stood trial with co-defendants John Clyde Abel, Frank Citro, Frank Serrao, John Barro, Joseph Bolognese, and John Meccia. Barro, Bolognese, and Meccia were acquitted on all charges against them, while Abel, Citro, and Serrao were convicted on the RICO substantive count but were acquitted on the RICO conspiracy count. Abel, Citro, and Serrao also were convicted on various charges of making extortionate extentions of credit and of using extortionate means to collect extensions of credit. The court of appeals affirmed Abel's and Citro's convictions in the same opinion that disposed of petitioner's claims. Serrao's appeal was delayed because of his first attorney's failure to file a brief. That appeal has been argued but is still pending. Gov't C.A. Br. 2-3 n.1.

and Serrao, co-defendant John Clyde Abel, and co-conspirators Kurt Ehle and Thomas Szamocki functioned as the organization's enforcers. Operating principally out of the California Bell Club, a licensed poker club in Bell, California, the organization made loans that bore interest at rates of five to ten percent per week. The loans were made with the understanding that a borrower's failure to make timely payments would result in physical reprisal. Abel, Serrao, Ehle, and Szamocki used violence or threats of violence to persuade various borrowers to repay their loans. Citro, Cohen, Abel, and Serrao collected the loan payments and turned their collections over to petitioner. He in turn gave them a percentage of the amounts they had collected. Pet. App. 3a; Gov't C.A. Br. 3-4.

2. a. Prior to trial, petitioner moved to suppress the fruits of electronic surveillance. He contended that the district court orders authorizing the surveillance were deficient under 18 U.S.C. 2518(4)(c) because they did not sufficiently particularize the offenses for which electronic surveillance was authorized.[2] The district court rejected that claim. Although one paragraph of the surveillance orders referred merely to offenses "enumerated in" 18 U.S.C. 2516, the district court noted that other paragraphs identified specific offenses subject to the surveillance —including extortion, interstate travel, and murder. Gov't C.A. Br. 6-7.

b. Both before and after trial, petitioner moved to dismiss the indictment on the ground that the gov-

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[2] Section 2518(4)(c) provides that every electronic surveillance order "shall specify * * * a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates[.]"

ernment had presented perjured testimony to the grand jury. In particular, petitioner claimed that grand jury witness Johnny Angelo had testified falsely about when he had become an informant and about any consideration he had received for his testimony; that the government had withheld from the grand jury information that undercut Angelo's credibility, particularly his criminal record; and that FBI Agent William Wiechert had compounded Angelo's perjury by repeating Angelo's false statement about the date he had become an informant. Angelo did not testify at trial, but petitioner secured an affidavit from him after trial. In that affidavit, Angelo claimed that he had been told by FBI agents to lie to the grand jury. Angelo later recanted that statement and testified at two post-trial hearings. Although he took issue with certain statements attributed to him in the government's affidavit for a wiretap order, Angelo said that he had testified truthfully before the grand jury. After considering all of petitioner's submissions, the district court denied his motion to dismiss the indictment. Pet. App. 15a-17a.

Petitioner also contended that government witness Irving Minster had perjured himself before the grand jury by denying that he was a loanshark at the California Bell Club. Petitioner further asserted that FBI Agent Wiechert and the prosecutor had known from a prior investigation that Minster's testimony was perjurious, but had failed to correct it. At trial, Minster repeated his denial of loansharking activities. Thereafter, Agent Wiechert testified about certain tape-recorded conversations with Minster suggesting that Minster was in fact a loanshark. The district court denied petitioner's mid-trial motion to dismiss the indictment on account of Minster's

perjury. The court explained that although the government had only belatedly revealed to defense counsel the evidence impeaching Minster as a witness, that evidence was nonetheless available in time for use at trial. The court also found that the government's trial attorneys had not been aware of the evidence, largely because of Wiechert's malfeasance, and thus dismissal would be inappropriate. The court denied petitioner's post-trial motion to dismiss the indictment on the same grounds, finding in addition that there was sufficient evidence to support the indictment without Minster's testimony. Pet. App. 19a-20a.

3. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-30a. It unanimously rejected his Title III claim, concluding that the wiretap orders, when construed as a whole, sufficiently particularized the offenses that were the authorized subjects of the surveillance orders. *Id.* at 4a-6a. By a divided vote, the court also rejected petitioner's prosecutorial misconduct claims. Relying on *United States* v. *Mechanik*, 475 U.S. 66 (1986), the court explained that, in view of petitioner's conviction at trial, any error in presenting Angelo's testimony to the grand jury was harmless. Pet. App. 17a. The court alternatively found, under *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988), that any errors involving Angelo's testimony did not substantially influence the grand jury's decision to indict petitioner. The court reached the same conclusion about Minster's grand jury testimony, finding that the prosecutors had not known of Minster's perjury and that there was ample other evidence to support the indictment. Pet. App. 19a-20a. Finally, the court held that the cumulative effect of the al-

leged misconduct did not warrant dismissal of petitioner's indictment. *Id.* at 20a-21a.[3]

Judge Pregerson concurred in part and dissented in part. Pet. App. 27a-30a. In his view, Angelo's false testimony about the date he had become an informant, coupled with the government's failure to advise the grand jury that it had terminated Angelo as an informant, warranted dismissal of the indictment. *Id.* at 27a-29a. Judge Pregerson also stated that the cumulative effect of the asserted misconduct required dismissal of the indictment. *Id.* at 29a-30a.

ARGUMENT

1. Petitioner contends (Pet. 9-13) that his indictment should have been dismissed because of alleged acts of misconduct before the grand jury. In particular, petitioner contends that the government failed to inform the grand jurors that Angelo, a witness before the grand jury, had nine felony convictions and had been discontinued as an informant. In addition, petitioner asserts that the prosecutor knowingly condoned perjurious grand jury testimony by Angelo and Minster. The courts below correctly rejected those claims.

In the first place, petitioner's assertions are factually inaccurate. While Angelo had several felony convictions, the government did not hide that fact from the grand jury. To the contrary, Angelo acknowledged at the outset of his first grand jury ap-

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[3] The court of appeals also rejected challenges to the jury instructions, the admission of certain evidence, and the trial court's decision to interrupt and restrict counsel's closing argument. Pet. App. 6a-10a, 21a-26a. The petition does not present those contentions.

pearance that he was then serving sentences on two state convictions. Gov't C.A. Br. 30. Similarly, at his second appearance, Angelo informed the grand jury that he had several convictions and had just been released from prison the previous week. *Ibid.* And the prosecutor told the grand jury that the government had arranged for Angelo to serve his state sentence in a federal institution under the federal witness protection program. *Id.* at 31. The grand jury therefore plainly knew that Angelo had an extensive criminal record. Moreover, there was no reason to advise the grand jury of Angelo's temporary deactivation as an informant. Angelo was deactivated in April 1982, but was reactivated as an informant in August 1983, prior to his second grand jury appearance. Since Angelo's temporary deactivation took place well after the wiretaps were completed on petitioner's and his co-defendants' telephones, nothing about Angelo's deactivation could have affected the propriety of the wiretaps, which corroborated much of his testimony before the grand jury. *Id.* at 32.

Beyond that, it is clear that Angelo's testimony was not necessary, let alone crucial, to obtaining the indictment against petitioner. All of the victims of petitioner's loansharking operation testified before the grand jury, and thus the grand jury heard abundant evidence about the offenses. Indeed, when Angelo thereafter became unavailable for trial, the government had to strike only two of the 40 overt acts in the indictment. See Pet. App. 17a. In short, as the court below held, Angelo's testimony "did not 'substantially influence the grand jury's decision to indict' nor conflict with the 'fundamental fairness' standard." *Id.* at 18a. What is more, the petit

jury's decision to convict petitioner—without Angelo's testimony—means "not only that there was probable cause to believe that [he was] guilty as charged, but also that [he is] in fact guilty as charged beyond a reasonable doubt." *Mechanik*, 475 U.S. at 70. In light of the overwhelming proof of petitioner's guilt—both before the grand jury and at trial—the failure to inform the grand jury of Angelo's temporary deactivation as an informant, or of the exact number and nature of Angelo's prior convictions, cannot have been material to the grand jury's decision.

The same is true of Minster's testimony. As the courts below found, see Pet. App. 20a, the prosecutors did not "condone" Minster's perjury. Indeed, the prosecutors did not learn of the perjury until mid-trial. See *ibid.* And petitioner offers no reason to dispute the lower courts' factbound conclusion that any misconduct concerning Minster was harmless. *Id.* at 19a-20a.

For these reasons, petitioner's reliance (Pet. 10) on *Napue* v. *Illinois*, 360 U.S. 264 (1959), is misplaced. In *Napue*, the Court held that a conviction may not be based on the knowing use of perjured testimony. In the present case, by contrast, there was no "knowing" use of perjured testimony, either in the grand jury or at trial, as both lower courts made clear. Pet. App. 20a. At trial, the jury received evidence through Agent Wiechert that cast substantial doubt on Minster's claim that he was not engaged in loansharking. The petit jury's verdict, based on evidence that revealed the suspect nature of Minster's claim of innocence, shows that the grand jury was not deceived by Minster's testimony into

returning an indictment when one was not warranted.[4]

2. Petitioner also contends (Pet. 14-15) that the wiretap orders did not sufficiently particularize the crimes that were the authorized subjects of the surveillance. There is no merit to that claim.

The wiretap orders stated in pertinent part that there was probable cause to believe that petitioner and others were engaging in extortion in violation of the Hobbs Act (18 U.S.C. 1951), interstate travel in aid of extortion (18 U.S.C. 1952), extortionate credit transactions (18 U.S.C. 892-894), conspiracies to commit those offenses (18 U.S.C. 371), and RICO violations (18 U.S.C. 1962) with the foregoing offenses as predicate acts. Pet. App. 5a. The first order also stated that the interceptions would focus on racketeering activities "involving extortion and murder." *Ibid.*

Petitioner concedes (Pet. 14) that the orders particularized the foregoing crimes, but he claims (*ibid.*) that the orders were nevertheless too general because another paragraph stated that the interceptions would involve "the offenses enumerated in Sec-

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[4] Neither is this case like *Mesarosh* v. *United States*, 352 U.S. 1 (1956). There the government discovered after trial that one of its principal witnesses had likely testified falsely in other cases. This Court reversed and ordered a new trial, concluding that the defendant's conviction could not rest on tainted testimony. *Id.* at 9. In the present case, however, the evidence at trial revealed the likely falsehood of Minster's claim of innocence. Moreover, the courts below found that petitioner had an ample opportunity at trial to challenge Minster's perjury. The courts also concluded that, in light of the wealth of evidence before both the grand jury and petit jury, petitioner had not shown that either his indictment or conviction rested on tainted testimony.

tion 2516." As the court of appeals explained, the latter, general statement was limited by other, more specific references to particular offenses. Pet. App. 5a-6a. The courts of appeals have uniformly upheld wiretap orders under such circumstances. See, *e.g.*, *United States* v. *Giacalone*, 853 F.2d 470, 480-481 (6th Cir.), cert. denied, 488 U.S. 910 (1988); *United States* v. *Licavoli*, 604 F.2d 613, 620 (9th Cir. 1979), cert. denied, 446 U.S. 935 (1980); *United States* v. *Cohen*, 530 F.2d 43, 45-46 (5th Cir.), cert. denied, 429 U.S. 855 (1976); *United States* v. *Turner*, 528 F.2d 143, 153-155 (9th Cir.), cert. denied, 423 U.S. 996 (1975). See also *United States* v. *Carneiro*, 861 F.2d 1171, 1179 (9th Cir. 1988); *United States* v. *Smith*, 726 F.2d 852, 865 (1st Cir.), cert. denied, 469 U.S. 841 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1990

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